DEPARTMENT OF CARRIERS AND TRANSPORTATION COMPANIES.

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SMITH ET AL. *v.* CHAMBERLAIN.[1] SUPREME COURT OF SOUTH CAROLINA, MARCH 29, 1893.

Separate Accommodations for Whites and Blacks.

It is settled that depot agents have the power, as incident to the office, to make reasonable regulations as to the conduct of business at their depots, unless restricted, limited or controlled in that respect. It is not unlawful to provide separate accommodations for whites and blacks if such accommodations are equally comfortable and decent.

The action was brought by Rebecca Smith against Daniel H. Chamberlain, receiver of the South Carolina Railway Company, to recover damages for being ejected from a certain room in the Graniteville Station, where she had gone to buy a ticket. An incidental question as to pleading may be passed by. The facts that raise the main question in the case appear in the charge of the Court below and in the opinion of the Supreme Court, and are, briefly, that the plaintiff was requested to leave the waiting-room she had entered and go to another; that she refused, and that she was in consequence ejected. There were contentions in her behalf that the respective waiting-rooms were not equal in comfort, and that in the absence of ratification by the company the station agent had no right to make arrangements for separating blacks from whites. Judgment for defendant. Appealed; judgment affirmed.

Opinion by MCGOWAN, J.

The classification of mankind by the owners or controllers of public places and institutions for the convenience of all concerned is a long-prevailing and generally-accepted custom. Girls' schools and boys' schools, women's and men's entrances and conveniences at hotels, their separate rooms at railroad stations, on ferryboats and in restaurants are to be seen every day. These restrictions upon the individual rights of the citizen, greater in some cases (as

[1] Reported in 17 Southeastern Reporter, 371.

at a school where no male can receive instruction), less in others (as in a ladies' room at a station, where a man may go but may not smoke), do not render the classified people unequal before the law or in their liberty to pursue happiness. They are based upon the hitherto marked difference between the sexes in nature, habits and tastes, and it is a small minority that would quarrel with them.

A NOTE OF THE LINE OF CASES IN WHICH THE DISCRIMINATION IS MADE NOT BETWEEN THE SEX BUT THE COLOR OF CITIZENS.

On the continent of Europe it is common for the railroads to reserve cars for women who are traveling alone, and in these the men are not permitted to travel. In all probability we should have the same custom in this country were it not for the greater respect which the American pays to women, and also that our larger cars, by reason of their publicity, protect women from insult. Such custom, however, has existed and been adjudicated upon.

The New York Central Railroad had made a regulation that one car should be set apart for ladies and for ladies and gentlemen, and should be retained for that purpose as long as people could get seats in the other cars. A placard was put upon the car in the train which plaintiff desired to take, stating that it was so reserved, and a brakeman was stationed at the door with oral instructions to give notice to any gentleman unaccompanied by a lady and to direct him to another car. Plaintiff attempted to enter the car, when he was informed by the brakeman that it was reserved, and requested to take another car. Plaintiff, notwithstanding this, entered the car, from which he was forcibly ejected by the brakeman. An action to recover damages was brought. FOLGER, J.: It was a reasonable regulation for the defendant to make that one car should be set apart, in the first instance, for females traveling alone or with male relatives or friends. It tended to their comfort and security and to the preservation of good order, which it is a duty of a carrier of passengers to be vigilant in seeking. As they had the right to make the regulation, so they had the right to enforce it, even to the extent of removing from that car a male person who entered it with no female under his care: Peck *v.* N. Y. C. &. H. R. R. R. Co., 70 N. Y., 587; C. & N. W. R. R. *v.* Williams, 55 Ill., 185.

It is unnecessary to cite any further examples of classification upon a sex basis. The language of the court may be, and is, applied to all such classifications, whether they occur on a train, in a station, a restaurant, a hotel, or a school or college. If it *tend to the preservation of good order*, the sense of the community accepts it and raises no question about equal rights, because equal rights are not thereby assailed.

In an examination of decisions where the classification is upon a color basis, the doctrine of certain school cases is pertinent to notice.

The plaintiff applied for a writ of mandamus against the local

school directors and teacher, in a sub-district of a township, to admit the children of the plaintiff to the privileges of a specific district school. The school was for whites; the plaintiff's children were colored. There was an available school for colored children, admittedly equal to the white schools. The defendants claimed that they might properly insist that the plaintiff's children be educated in the school established for colored children, and that they rightfully refused them the instruction in the school for white children. Under the constitution and laws of the State, the right to classify the youth of the State for school purposes, on the basis of color, and to assign them separate schools for education, had been long established. The plaintiff claimed such classification contravened the provisions of the Fourteenth Amendment of the Constitution of the United States: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The Court held that this amendment did not make the State law unconstitutional, but only afforded to colored citizens an additional guaranty of equality of rights to those already secured by the constitution of the State. If the law worked no substantial inequality of school privileges between the children of both classes the plaintiff had no claim. "Nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school:" The State of Ohio *ex rel.* William Garnes *v.* John W. McCann and others, 21 Ohio St., 198 (1871); Van Camp *v.* the Board of Education of Logan, 9 Ohio St., 406 (1859); Roberts *v.* City of Boston, 5 Cush., 198 (1849); Dallas *v.* Fosdick, 40 How. Pr., 249 (1869); State of Nevada *ex rel.*, Stoutmeyer *v.* Duff *et al.*, Nevada, 342 (1872); People *ex rel.* Dietz *v.* Easton, 13 Abb. Pr. (N. S.), 159 (1872); Cory *et al. v.* Carter, 48 Ind., 327 (1874). Petition for mandamus, setting forth that plaintiff, being 12 years old, had applied for admission to the grammar school in her neighborhood, and that the defendants refused to admit or receive her as a pupil, but illegally excluded her therefrom. The defendants in their answer admitted the statements of birth, age, application, refusal, etc., and averred that the plaintiff belonged to the colored race. That since the organization of the school district there had been and was a separate school for colored children, in a comfortable building, with proper furniture and provided with a competent teacher. That plaintiff had attended said school for colored children up to the time she demanded admission

to the grammar school. That before this suit was brought they proposed to the plaintiff's father to create a grammar class in said colored school for the instruction of the plaintiff, and to put in charge thereof a competent teacher. That public interest in said district was opposed to the intermingling of white and colored children in the same schools, and the best interests of both races required them to be educated in separate schools. The defendants also set up that by the power to establish schools, etc., and the discretionary power in relation thereto given them by the school law, they had and have the right to require the colored children to attend such separate school. Demurrer sustained. Appealed; affirmed. The Court: "In view of the principle of equal rights to all, upon which our government is founded, it would seem necessary, in order to justify a denial of such equality of right to any one, that some express sovereign authority for such denial should be shown. Now, under our Constitution, which declares that provision shall be made 'for the education of *all the youths of the State* through a system of common schools,' which constitutional declaration has been effectuated by enactments providing for the 'instruction of youths between the ages of five and twenty-one years,' without regard to color or nationality, is it not equally clear that all discretion is denied to the board of school directors as to what *youths* shall be admitted? It seems to us that the proposition is too clear to admit of question. We conclude, therefore, that the law makes no distinction whatever as to the right of children between the ages of five and twenty-one years to attend the common schools, and that there is no discretion left with or given to the board of school directors to make any distinction in regard to children within the specified ages. Doubtless the board may, in its discretion, fix the boundaries within which children must reside in order to be entitled to admission to a certain school.

"But this discretion is limited by the line which fixes the *equality of right* in all the youths below the ages of five and twenty-one years. If the words 'colored race' be stricken from the answer, and the word 'English,' 'Irish,' or 'German,' inserted in their place, it would present precisely the same *principles* for our determination as is now presented. It was the clear legal duty of the board of directors resulting from this said office to admit the plaintiff to said school, and to equal privileges with the other pupils therein." WRIGHT, J., dissenting: "The language of the statute, that, where a discretion is left to an inferior tribunal the writ of mandamus can only compel it to act, and that it cannot control this discretion, is but the recognition of the rule as it stood at common law. The duty to be performed must be inperative, not discretionary. Now, if the foregoing opinion had placed the affirmance of the case upon the ground that it was the right of the scholar to attend the school provided for scholars in the sub-division *where she resided*, I should have been content. So, too, if the scholar was so far advanced that she could not receive proper instruction in the colored school. Upon either of these grounds I could have concurred.

I am not prepared to admit that school directors have no discretion in arranging the schools, provided, of course, they have furnished them the necessary and proper instruction. All have a right to attend the common schools. And this is what the Constitution intended to secure. I cannot admit that the refusal to admit this scholar into this particular school was so wrongful as that the courts should interfere by mandamus. If she was allowed to attend a school in the proper district, having the suitable instruction furnished to others, then I know of no principle upon which she can complain. There is no absolute legal right in a colored child to attend a white school rather than one made up of children of African descent; just as there is no such right in a white child to attend a colored school. The true inquiry is: Have all equal school privileges?" Clark *v.* Board of Directors. 24 Iowa, 266.

Commenting upon this line of cases, Mr. Justice CLIFFORD (Hall *v.* DeCuir, 95 U. S., 505) says: "Age and sex have always been marks of classification in public schools, throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school, and white children to another, or they might make any such classification as they should deem best, whether based on age, sex, race, or any other reasonable existant condition:" State *v.* Duffy, 7 Nev., 342. It would seem, therefore, that the weight of authority is against the decision in the Iowa case.

It will now be seen that the same line of discussion which the school cases raise obtains in railroad and steamboat companies; and that the various views taken of the powers of carriers are similar to those expressed concerning the discretion of directors and trustees of public schools, of innkeepers, and controllers of other institutions.

The dates prefixed to the following cases should be noticed.

1861. Grines *v.* McCandless, 5 Phila., 255. Action of trespass brought to recover damages for the expulsion of the plaintiff from one of the lines of passenger cars by the defendant. The defendant relied for his justification on a regulation of the railroad company, prohibiting the entrance of negroes into the body of the cars, and confining them exclusively to the front platform. The Court: "A corporation created for the carriage of passengers certainly cannot refuse arbitrarily to carry any man, or any class of men, without laying itself open to an action for damages. It may, however, lay down rules for the comfort and convenience of those whom it is bound to carry. What rules are proper must necessarily be left to the discretion of the corporation in the first instance, subject to the control and supervision of the courts of justice. When it becomes necessary to lay down rules for the government and association of men in public, public sentiment must be consulted with caution indeed, and not without some reluctance. And when a nation suffers as ours does from the misfortune of having two races within its bosom, one long civilized and the other emerging from the shades of barbarism, and each indelibly marked by diversities of manners. There is much in the relation between them which must

be left to the lessons of experience and the tribunal of public opinion, which cannot be arbitrarily forced or hastened without producing or augmenting repulsion and antipathy. In the belief, then, that the regulation now before us is a wise one, or if not wise will work its own cure best when least molested, we enter judgment for the defendant."

1865. Derry *v.* Lowry, 6 Phila., 30. The Court: "The important question involved in this action is the right claimed by conductors of city passenger railways to refuse passage to persons of color, and to eject such persons from the cars of which they have charge, where entrance to the same is obtained without their knowledge or consent. There was no such regulation of the Lombard and South Street Passenger Railroad, but I instruct you as a principle of law that the existence of such a by-law would not avail the defendant. The logic of events of the past four years has in many respects cleared our vision. Verdict for plaintiff. Fifty dollars damages."

1869. West Chester & Philadelphia Railroad Co. *v.* Miles, 55 Pa. St., 209. The Court: "It is admitted no one can be excluded from carriage by a public carrier on account of color.

"But the defendants in their point asked the Court to say that if the jury find that the seat which the plaintiff was directed to take *was in all respects a comfortable, safe, and convenient seat, not inferior in any of these respects to the one she was directed to leave*, she should not recover. The case, therefore, involves no assertion of the inferiority of the negro to the white passenger, but, conceding his right to be carried on the same footing with the white man, it assumes it to be not unreasonable to assign places in the cars to passengers of each color. The ladies' car is known upon every well-regulated railroad, implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none. The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and the black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. We are compelled to declare that, at the time of the alleged injury, there was that natural, legal and customary difference between the white and the black races which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace and maintain the rights both of carriers and passengers:" READ, J., dissents.

1867. Act of Legislature, P. L. 38: "Any railroad or railway corporation within this commonwealth that shall exclude, or allow to be excluded by their agents, conductors or employees, from any of their passengers cars, any person or persons on account of color or race, or that shall refuse to carry in any of their cars thus set apart any person or persons on account of color or race, or that shall for such reason compel or attempt to compel any person or persons to occupy any particular part of any of their cars set apart for the ac-

commodation of people as passengers, shall be liable in an action of debt to the person thereby injured or aggrieved in the sum of $500."

1878. Central R. R. New Jersey *v.* Green and wife, 86 Pa. St., 421, 427: Debt for the alleged exclusion of Mrs. Green from the cars of defendants. The Court: "It is very clear from the whole evidence on both sides that Mrs. Green, the plaintiff, was excluded from the rear car of the train. The brakeman gave no reason. Did they exclude her because of her color? The fact of smoking was denied stoutly. The evidence is clear that these persons were respectable, decent persons. Judgment for plaintiff in Court below affirmed." Mr. Justice PAXSON: "The Act of March 22, 1867, P. L. 38, should receive a reasonable construction. It was manifestly intended to prevent railroad companies making distinctions between passengers on account of race or color. But I do not think it was intended to give them [colored persons] superior privileges, or to so interfere with the reasonable police arrangement of the railroad companies in operating their road and moving their cars as to enable a colored man to force himself into a car where, by reason of such police regulations, a white man may not enter. An ordinary traveler takes his seat in such car as may be pointed out to him by those in charge of the train. He has a right to a seat, but not to a seat in any particular car. I am unable to see that the mere fact of Mrs. Green's exclusion was on account of race or color. She was directed to enter a car in which white persons were seated, and which was the equal in every respect of the car from which she was excluded." (See same case in court below: 2 W. N. C., 590). Upon the construction of a similar statute, see Railroad *v.* Brown, 17 Wallace, 445.

1887. Pamph. L., 130, 131, May 19: "*Be it enacted, etc.*, that any person, company, corporation, being owner, lessee or manager of any restaurant, hotel, railroad, street railway, omnibus line, theatre, concert hall, or place of entertainment or amusement, who shall refuse to accommodate, convey or admit any person or persons on account of race or color over their lines, or into their hotel or restaurant, theatre, concert hall or place of amusement, shall, upon conviction thereof, be guilty of a misdemeanor, and be punished by a fine not less than $50 nor more than $100."

Commonwealth *v.* Oberbeck, reported in the *Evening Call*, November 21, 1889, page 2: The defendant, a restaurant keeper, had told a colored customer, who had seated himself at a bar upon a stool, that he must go back into the dining-room where he would be served. The jury were instructed that the question was: Did the defendant refuse to accommodate the customer? That refusal to serve in one room does not necessarily mean refusal to accommodate, and that these facts were for them to find. Verdict of not guilty.

It is to be noted how much less stringent the language of the act of 1887 is compared with the earlier quoted act of 1867. In the later act nothing prevents separate accommodations being furnished, whether by railroads or hotels, or any other public institution. The

railroad must not exclude anyone from its *line*. That is all. No mention of cars or parts of cars is made, and the fine is $1 instead of $500.

In other States similar enactments may be found. In Mississippi (1888) and Louisiana (1890) passengers may be classified by cars or parts of cars. In Tennessee, Arkansas, Texas, Alabama, Mississippi, Florida and Louisiana they are required to provide separate cars, of equal accommodation, for whites and blacks. The statutes are all within five years of each other, ranging from 1887 to 1891, and it need hardly be observed that such a provision in Texas is most wise. The geography and social conditions of a country so wide and various as the United States necessarily cause wide variations between the laws of the several sections. Georgia and South Carolina provide that no *discrimination* shall be made by carriers on a color basis. The difference between *discrimination* and *classification* is important, and there is no lack of decisions that emphasize it.

Where a colored woman was refused admission to one part of a steamboat plying between Savannah and Palatka, and directed to another part of the vessel affording substantially the same accommodations, it was held that she had no cause of action for such exclusion: Green *v.* City of Bridgeton, 9 Cent. L. J., 206.

Where a colored woman was forcibly excluded from the general dinner table on a steamboat, and ordered to take her meals upon the guards of the boat or in the pantry, as was customary for colored passengers, the Court held that under the Fourteenth Amendment and the Civil Rights Bill of 1866, which guaranteed to colored persons the right to make and enforce contracts, she had a right to the accommodations demanded. In this case, however, the accommodations set apart for blacks were obviously inferior: Coger *v.* Northwestern Union Packet Co., 37 Iowa, 145.

By the rules and regulations of a boat the plaintiff, a colored person, was excluded from the cabin. The regulation was averred to be rea sonable. To this answer of defendant plaintiff demurred. *Held*, that the demurrer was not well taken. That the reasonableness of such regulation is a mixed question of law and fact, to be found by the jury on trial, under the instructions of the Court, and cannot be determined on demurrer: Day *v.* Owen, 5 Mich., 520.

So, in accordance with the same reasoning, when a colored woman was roughly excluded from the ladies' car and directed to take a seat in a car set apart for men, it was held that a verdict of $200 recovered by her against this company was not excessive: C. & N. W. Ry. Co. *v.* Williams, 55 Ill., 185.

In certain of these cases questions regarding the Interstate Commerce regulations of Congress and the Fourteenth Amendment and the Civil Rights Bill are raised. For opinions that none of these enactments regard the police power of common carriers to regulate the manner in which they shall transport their passengers, see Green *v.* City of Bridgeton, 9 Cent. L. J., p. 207; The Civil Rights Bill, 1 Hughes, 541, pp. 546–550; Hall *v.* De Cuir, 95 U. S., pp. 506–508; Gray *v.* Cincinnati Southern R. Co., 11 Fed. Rep., 685–686; Smoot *v.* Kentucky Central Ry. Co., 13 Fed. Rep., 341–344.

This police power of carriers to

regulate their transportation for the best convenience and safety of all passengers is vested in them by common law, and they are entitled to make suitable regulations: SHAW, C. J., in Commonwealth *v.* Power, 7 Metc., 601; Hibbard *v.* Erie Railroad Co., 15 N. Y., 455; Miner's Central Railroad Co. *v.* Whittemore, 43 Ill., 520. They are in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests, but who is not only empowered to make such proper arrangements as will promote his own interests, but bound to regulate the house so as to preserve order, and, if practicable, prevent breaches of the peace: Vinton *v.* Middlesex Railroad Co., 11 Allen, 304; Penna. R. R. Co. *v.* Langdon, 92 Pa. St., 21.

Council *v.* W. & A. Ry. Co., 1 Interstate Com. Rep., 638. Colored plaintiff was ejected from defendant's car and forced to ride in an inferior one, being struck and bruised on his refusal to change his quarters. Opinion: There was in the train no car furnishing the accommodations for which the complainant had paid and was entitled to have other than the one from which he was removed because he was a colored man. In denying to complainant equal accommodations permitted the other passengers paying the same fare, the railroad company subjected him to undue prejudice and unreasonable disadvantage, in violation of the act to regulate commerce.

Heard *v.* Georgia R. R. Co., 1 Interstate Com. Rep., 719. Petitioner, a colored minister of the Gospel, purchased a first-class through ticket. He was obliged to travel in an inferior car. Opinion: It is not with sole regard to the wishes or conceptions of ideal justice of colored persons, nor only with deference to the prejudices or abstract convictions of white persons that a practical adjustment is to be reached, but with enlightened regard to the best interests and harmonious relations of both. It being manifest upon the facts of this case that by the discrimination between white and colored passengers, and the accommodations furnished to colored passengers, the petitioner was subjected to unjust prejudice and disadvantage in violation of the statute, the duty of the commission might be regarded as performed in so deciding. But if a public sentiment exists in the State of Georgia and in some other States where the colored population is proportionately large, that renders separation of passengers on the ground of color expedient, either as a safeguard against disturbance or for other good reasons, it is obvious that the cars for the two colors should be equal in their comforts and accommodations, and that colored travelers should have no occasion for contrasting unfavorably their mode of transportation with that of white travelers in the same train when both pay a same price for carriage. The order of the commission, on the facts of the case, is that the Georgia Railroad Company, by requiring the petitioner to occupy a seat in a half car, deficient in comforts and conveniences, subjected him to undue prejudice and disadvantage in violation of the third section of the act to regulate commerce, and that the said railroad company cease and desist from subjecting colored passengers to such undue and unreasonable

prejudice and disadvantage, and that so long as its rule of separating passengers is maintained, its duty is to furnish for all passengers paying the same fare cars in all respects equal and provided with the same comforts, accommodations and protection for travelers.

On the point that a law forbidding a steamboat company from providing separate accommodations for whites and blacks is a restriction of commerce between the States, see Hall *v.* De Cuir, 95 U. S., 485.

The above line of cases, taken from before 1861 until 1893, sets forth very clearly the history of a national prejudice, and our progress *from* an inhuman and unenlightened attitude *through* an oversentimental attempt to correct this (1867-1870), resulting in statutes and decisions which practically (as Judge PAXSON pointed out) gave the blacks superior rights, *to* a poised and temperate level of common-sense, in which the courts most usually declare that in any community where the relations between the two races, are of such a character that a compulsory herding of them together is likely to result in breaches of the peace or discomfort, in such circumstances it is wise and proper that they should have equally good but separate accommodations.

The legal propositions upon which this view depends are:

(1) A railroad company has the common law right as a carrier to make reasonable regulations regarding and controlling the management and transportation of its passengers; and whether any particular regulation so made is or is not a reasonable one, is a mixed question of law and fact.

(2) A regulation providing separate and equal accommodations for whites and blacks is a reasonable one, if the social conditions of the district make separation in trains, boats, etc., advisable.

(3) The accommodations must be equal in convenience and comfort.

(4) The Fourth Amendment and the Civil Rights Bill do not affect or concern this police power of common carriers.

OWEN WISTER.